IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. 630.

THE BARRETT LINE, INC., *Appellant,*

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

**On Appeal from the District Court of the United States for the Southern District of Ohio.**

## BRIEF FOR THE BARRETT LINE, INC., APPELLANT.

ROBERT E. QUIRK,
*Counsel for Appellant.*

March, 1945.

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### OPINION BELOW.

No opinion was written by the District Court. It filed its *per curiam* decision July 28, 1944, (R. 28-29) in which the court adopted as its own findings of fact and conclusions of law the findings and conclusions of the Interstate Commerce Commission, Division 4, (R. 8-13) which are reported in 250 I. C. C. 809.

## JURISDICTION.

The final decree of the three-judge district court was entered on July 28, 1944 (R. 29). Petition for appeal was presented and allowed on September 15, 1944 (R. 30-33). The jurisdiction of this court is conferred by section 210 of the Judicial Code, 36 Stat. 1150, as amended by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 220 (28 U. S. C. A. 47a), and section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. 345). This court entered its order noting probable jurisdiction December 4, 1944 (R. 149).

## QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission in denying the application of appellant for a permit to continue to operate as a contract carrier by water misconceived and misapplied the provisions of the "grandfather" clause of section 309(f) of Part III of the Interstate Commerce Act and acted arbitrarily and capriciously in so doing.

2. Whether the Commission committed an error of law and acted arbitrarily in concluding that the appellant was not on the "grandfather" date, January 1, 1940, or within a reasonable period prior thereto, and is not at the present time a contract carrier by water subject to the provisions of Part III of the Interstate Commerce Act. This requires a consideration of sections 302(e), 303(b) and 309(f) of that Act.

3. Whether the action of the Commission in concluding that the appellant is not entitled to a permit to establish a new or future operations under the provisions of section 309(g) of Part III of the Interstate Commerce Act was unreasonable, arbitrary and capricious.

4. Whether the District Court erred in sustaining the order of the Commission in respect to the applications of the appellant for permits under sections 309(f) and 309(g) of the Interstate Commerce Act.

## STATUTES INVOLVED.

The statutes involved are sections 302(e), 303(b), 309(f) and 309(g) of the Interstate Commerce Act. The pertinent provisions are set forth in the appendix.

## STATEMENT.

The appellant is a contract carrier by water. It was incorporated in the State of Ohio in 1926. It is the successor of Oscar F. Barrett, who in turn was the successor of other members of the Barrett family, who have conducted water carrier operations on the Ohio and the Mississippi Rivers and their tributaries for approximately 100 years. Cincinnati Ohio is the port of registration of appellant and Cairo, Illinois is the situs of its fleet and the port to and from which its equipment is operated. The appellant is what is known in the river trade as an irregular operator which performs special and sporadic services under special contracts and conditions. The principal commodities handled by appellant in recent years consist of scrap iron, pig iron, fabricated steel, pipe, steel piling, sulphur, stone, and petroleum products. The appellant has from time to time handled other commodities under special contracts. Its operations fluctuate widely both as to volume, the territory served, and the character of the commodities handled. It pioneered the transportation by water of automobiles, of bauxite ore, and of petroleum. Generally speaking, the operations of appellant are confined to a comparatively few contracts at particular times.

The appellant performs two types of freight services, namely, tow boat service and barge service. It performs a freighting business with its own barges and power and a tow business with respect to barges owned by others. In addition, it does a substantial chartering business that contemplates the handling of both freight and the leasing or chartering of its equipment to others. Except for its chartering transactions, which by section 302(e) of the

Act constitute the engaging in transportation as a contract carrier by water, the freighting business of the appellant has been confined exclusively to the transportation of petroleum products in bulk since the "grandfather" period. During the years 1936 to and including September, 1942, when the Commission heard the evidence, appellant engaged in 43 chartering transactions, in 23 of which it leased or chartered its equipment to various shippers, none of whom are carriers subject to the Interstate Commerce Act (R. 117-126).

Appellant has published and filed with the Commission its schedule of minimum rates and charges, which includes its rules, regulations, and practices which govern the assessment of the charges and the conditions under which its services will be performed (R. 130-144). In general, the commodities handled by appellant consist of materials which may be subjected to exposure to weather without damage, bulk goods for example, and which move under special contracts for fixed periods with minimum quantities. The appellant will not accept less than barge load quantities of 500 tons. Its rates for transportation are based upon what is characterized as "free on" and "free off" service. These terms mean that the shipper loads and the consignee unloads the barge at their expense. Appellant does not own or operate any terminals or terminal facilities. It issues no bills of lading or other billing. It simply makes an invoice to its customers. It maintains no solicitors. When appellant is negotiating a contract with a prospective customer competition with other carriers does not enter the picture. In negotiating contracts with prospective customers a large number of factors are considered, such as, for example, the seasons of the year, the course of the river over which the transportation is to be performed, the time of unloading and loading, and other factors which affect the ability of the appellant to perform the service required and of the other party to the contract to meet the conditions under which the appellant operates.

The length of the contracts average from four to six months, and are never less than from two to three months. The appellant does not handle spot movements of freight.

On January 1, 1940, appellant owned three steam stern-wheeled tow boats and 25 barges. It also owned two derrick boats and four fuel barges, called fuel flats. In river language a barge is a vessel that is non-self propelled and is usually unmanned. It carries the freight or cargo. The tow boat is the power unit that furnishes the motive and pushes the barges up and down the river. Tow boats owned by appellants are used to tow its own barges as well as barges owned by others, including common carriers. The tow boats of appellant have been and are at times used to tow loaded and empty barges for other carriers, as well as for shippers. At the time of the hearing, September 1942, the appellant owned two tow boats and 21 barges. It was using three documented gasoline barges to haul petroleum traffic in bulk. It has six barges under charter to the Standard Oil Company of Ohio, which are used in the movement of crude oil in bulk. It has six other barges under charter. Two barges are in the fuel trade and four barges are ready for such service as may be necessary to meet the demands. Appellant's barges are made of steel and were designed originally with the idea that they could be converted to carry liquid cargo, but at the time they were built the necessary piping and fitting to carry oil were not installed. These fittings were later attached to the barges which are now used in the transportation of petroleum products. Witness Barrett, who is president of the appellant, testified that when the present movement of petroleum ceases the barges used in such transportation could be quickly reconverted for the handling of general cargo. The Office of Defense Transportation and the Petroleum Administrator have encouraged the appellant to continue to use its barges in the transportation of petroleum products.

Exhibit 1 of record before the Interstate Commerce Commission, reproduced at pages 117-126 of the printed record, shows the rivers and ports served, as well as the commodities handled and the other services performed by the appellant during the year 1936 to the time of the hearing. This exhibit also shows the number of chartering transactions of the appellant during that period.

The financial condition of the appellant is shown by exhibit 2 of the record before the Commission (R. 27). This exhibit consists of a balance sheet of the appellant as of June 30, 1942. The appellant's assets amounted to $935,123.56 as of that date; of the total assets about $280,000 are liquid.

Item 25 of appellant's tariff I. C. C. No. 1 (R. 136) provides charges on "all commodities in barges" between all ports served by appellant. This item was included in the tariff in this form to avoid the necessity on the part of the appellant of publishing minimum rates on each and every commodity that it might contract to haul. Witness Barrett testified that while neither the appellant nor its predecessors had ever handled a wide variety or a large number of commodities in particular barges or during particular periods, appellant always has been ready and willing to make contracts to handle almost any commodity, principally of bulk characteristics, which the appellant was in position to transport at a given time, if the customer could meet the conditions under which the appellant operates. The appellant pioneered the movement of many commodities by barges which it has not had occasion to handle in recent years, but which in the course of time it may again contract to handle. In general, appellant has not handled the conventional type of merchandise. Its contracts of carriage have dealt chiefly with bulk materials which are not damaged by exposure to weather.

## PROCEEDINGS BEFORE THE COMMISSION.

Appellant seasonably filed an application with the Commission in the manner and form prescribed by the rules of the Commission for a permit to continue to operate as a contract carrier by water under the so-called "grandfather" provisions of section 309(f) of the Interstate Commerce Act. Subsequently it filed another application which seeks authority under section 309(g) to establish future operations on the ground that such operations would be consistent with the public interest and the National Transportation Policy. The latter application was filed at the suggestion of a representative of the Commission and out of abundance of caution. The applications were consolidated and were heard before an examiner of the Commission at Cincinnati September 1, 1942. At that hearing the Union Barge Line Corporation, Mississippi Valley Barge Line Company, Campbell Transportation Company, American Barge Line Company, each of which is a common carrier operating on the Ohio and Mississippi Rivers and their tributaries intervened and opposed the permits sought by the appellant. The Illinois River Carriers Association also intervened and opposed the appellant.

The report and recommendation of the examiner was served upon the parties. The examiner found that the appellant is not entitled to a permit under the so-called "grandfather" provisions of section 309(f), but is entitled to a permit under what he characterized as the broader provisions of section 309(g). In this connection the examiner said, *inter alia*,

> "The nature and extent of applicant's operations at present, and extending back over a long period of years, coupled with the evidence of record showing that it desires to continue such operations and has sufficient facilities and financial resources to do so, warrant the conclusion that applicant is fit, willing, and able to perform the service proposed."

By its decision of June 18, 1943 (R. 8-13) the Commission, Division 4, reversed the examiner and held (a) that the only transportation by appellant which might be subject to Part III of the Act consisted of chartering vessels of shippers, but that as no showing was made as to the nature of the services rendered, the commodities carried in, or the points served with, such vessels the Commission would not be warranted in finding that the appellant on, on January 1, 1940, and since, was engaged in chartering operations subject to Part III of the Act; (b) that the appellant had failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to Part III of the Act, and (c) while the Commission recognized that the present petroleum movement of the appellant is an emergency operation occasioned by the war, that considering appellant's normal operations for a period of approximately five years before the war it has not shown that its operation consisted of performing other than exempt transportation, and that no evidence was submitted to show that the future public convenience and necessity requires the operation of appellant, on which premise it concluded that appellant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the National Transportation Policy (R. 11-12).

On or about August 25, 1943, the appellant filed a petition for reconsideration by an oral argument before the entire Commission. By its order of December 6, 1943, the Commission denied that petition (R. 14-23).

## SUMMARY OF ARGUMENT.

### I.

The evidence of record establishes that the appellant was engaged in transporting property in interstate commerce as a contract carrier by water prior, on and since the "grandfather" date, January 1, 1940. Under the provisions of section 309(f) of the act no person shall engage in the business of a contract carrier by water unless he holds an effective permit issued by the Commission, except that if such a carrier was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which the application is made and has so operated since that time, the Commission shall issue such a permit without further proceedings. This section of the act does not require in terms that to be entitled to "grandfather" rights the water carrier must have been engaged in the transportation of commodities which would make the carrier subject to the provisions of the Act.

Section 302(c) defines the term "contract carrier by water" to mean "any person which under individual contracts or agreements, engages in the transportation * * * by water of passengers or property in interstate or foreign commerce for compensation." The appellant was so engaged prior, on and since the "grandfather" date. The test of inclusion under this section is the engagement of a contract carrier by water of passengers or property "in interstate or foreign commerce for compensation." While in its strictly transportation or freighting business the appellant was engaged in the transportation of petroleum products in bulk, which, as such, is excluded from the provisions of the Act by section 303(b), the appellant was nevertheless engaged in transportation subject to the act on and since the "grandfather" date by virtue of the fact that it made 23 chartering transactions under which it leased or chartered its vessels to various shippers, none

of whom are carriers subject to the Interstate Commerce Act. Under the provisions of section 302(e) such an engagement is defined to constitute "as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'."

Because no showing was made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels by the lessees, the Commission held that the chartering transactions did not constitute the engagement in transportation by the appellant as a contract carrier by water. In this finding the Commission clearly misconceived and misapplied the statute. Moreover, its decision is directly contrary to and inconsistent with the subsequent decision of the entire Commission of January 4, 1944, in the *C. F. Harms Company Case*, 260 I. C. C. 171. In the latter case the Commission held that where vessels are chartered or leased to shippers it is not necessary for the applicant to show the nature of the services rendered, the commodities carried in, or the points served with the leased vessels. This is sound since it is obvious that the lessor is not in position to make such a showing as only the lessee has such knowledge. Under section 302(e) the act of chartering or leasing vessels to a shipper which is not a carrier constitutes, without more, the engagement in transportation by water as a contract carrier. The *Harms case* also accords with the decisions of the Commission in the *Russell Bros. Towing Case*, 250 I. C. C. 429, and the *Moran Towing and Transportation Company Case*, 260 I. C. C. 269, and is not contrary to the decision of this court in *Noble* v. *United States*, 319 U. S. 88, 92, relied on by the appellees.

## II.

In disposing of the application of the appellant for authority to establish future operations and to make future contracts as a contract carrier by water, the Commission

erred and acted arbitrarily in finding that appellant had not shown that its operations consisted of performing other than exempt transportation, except for the shipment of fabricated steel piling made in 1936, and had not shown that the present or future public convenience and necessity requires operation by appellant in the performance of transportation subject to the Act (R. 12). It also erred in concluding that the appellant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the National Transportation Policy, or that present or future public convenience and necessity requires such operation (R. 12). A contract carrier, as distinguished from a common carrier, is not required to show that the present and future public convenience and necessity requires the proposed operation. A contract carrier is only required to show that the proposed operation will be "consistent with the public interest and the National Transportation Policy." In the *Scott Bros. Case*, 2 M. C. C. 155, 164, in construing the meaning of the phrase "consistent with the public interest", the Commission held that it meant "not contradictory or hostile to the public interest." The evidence shows that the appellant has been engaged as a contract carrier in chartering vessels and in transportation of various commodities under special contracts for a long period of time. The Commission has heretofore repeatedly held that evidence of this character establishes that the continuation of such an operation is required by present and future public convenience; and that if it were to decide otherwise the commission would not be following the direction of the National Transportation Policy of the Act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. *John L. Goss Corp.*, 250 I. C. C. 101, 103; *Choctaw Transportation Co.*, 250 I. C. C. 106, 107, and *Reidville Oil and Guano Co.*, 250 I. C. C. 71, 73.

The decision of the Commission, if sustained, will cause appellant irreparable injury. Without a permit to continue to handle general cargo and to engage in chartering transactions appellant will not be in position to make special contracts of that character until and unless in each instance it files an application with the Commission and obtains a permit. This involves expense and delays and is wholly impracticable. The decision of the Commission denies to the appellant the right to continue to perform the character of transportation it and its predecessors have performed on the Ohio and Mississippi Rivers, etc., for 100 years. It cannot be assumed that in enacting Part III of the Interstate Commerce Act Congress meant to obstruct or destroy the development of water carriers of the type of the appellant. Congress knew that water transportation had been conducted under a variety of special and unusual circumstances unknown to transportation by rail and by highway. The effect of the decision will be to place in a preferred position the large common carriers by water which operate on the Ohio and Mississippi Rivers since they will be able to handle both exempt and non-exempt traffic to the extent their equipment will permit, while carriers such as the appellant will be restricted to the transportation of exempt traffic.

## ARGUMENT.

### I.

### Appellant is Entitled to a Permit Under the "Grandfather" Provisions of the Act.

In concluding that the appellant is not entitled to a permit under the so-called "grandfather" provisions of section 309(f), the Commission acted arbitrarily and misconceived the law. In addition it failed to give effect to the spirit as well as the letter of the Water Carrier Act and the National Transportation Policy. We have already shown that the appellant performs a highly

specialized service. It is characteristic of such a carrier that its service under special contracts will be devoted to the transportation of particular commodities, or of one commodity, depending on the volume, during particular contract periods, to the exclusion of other commodities. The Commission failed to give effect to this characteristic in reaching its conclusion. The record before the Commission shows that during a long period of time the appellant had engaged in transportation of various commodities under special contracts and that many of these transactions would be subject to the provisions of the Act. It is true that, except for its chartering transactions which will be presently dealt with, for several years prior and since the "grandfather" date the appellant has been engaged in handling bulk commodities. On that account the Commission concluded that the appellant had failed to establish that it was in bona fide operation on the "grandfather" date, or within a reasonable period prior thereto, in the performance of transportation subject to Part III of the Act.

While inconsistency is not a ground for setting aside an order of the Commission, it does tend to establish arbitrariness. The Commission's decision in the instant case is inconsistent with the broad application of the Act given by it in other cases. Neither the "grandfather" provisions of section 309(f) nor the provisions of section 302(e), which define a contract carrier by water, require as a condition precedent to a permit that such a carrier must show that on or about the "grandfather" date and thereafter it was engaged in the transportation of non-exempt commodities. In the *Russell Bros. Case*, 250 I. C. C. 429, and in the *Moran Towing and Transportation Company Case*, 260 I. C. C. 269, the Commission issued permits to the applicants irrespective of the fact that they were engaged in exempt transportation. A certificate was issued to Moran, although engaged in towing service, all of which was exempt from the provisions of section 303(b) of the Act.

In its first decision in the *Moran Case*, 250 I. C. C. 541, which was sustained upon reconsideration in 260 I. C. C. 269, the Commission said:

> "• • • If we were to deny the application, applicant would no longer be able to hold out an unlimited general towage service to the public, but would be required to confine its services to exempted operations. Such limitation would require that applicant circumspectly examine every tender of business in order to determine whether or not the transportation would be exempted, and would deprive the public of the unlimited services which have been available."

In this statement the Commission properly construed the Act in the light of its purpose and of the peculiarities and special conditions under which water transportation is carried on. The principle there applied is equally applicable to the conditions under which the appellant operates, since it is clear that the action of the Commission in denying a permit to the appellant will require it to confine its services to exempted operations, merely because of the circumstance that under the emergency conditions which have existed for several years, the freighting business of the appellant has been confined to the transportation of petroleum in bulk. In the *Russell Bros. Case*, 250 I. C. C. at page 433, after referring to the "grandfather" clause of the Act which requires a showing of bona fide operation on and after the "grandfather" date, the Commission said:

> "It will be noted that in neither instance is there any reference to whether the transportation performed by the carrier is of is not subject to regulation. In determining a carrier's status and the scope of its operations during the 'grandfather' period, its entire operation should be considered, and not merely that part which the Congress has seen fit to make subject to regulation. To find that "grandfather" rights may be granted only to the extent that a showing is made as to the performance of regulated transportation requires the reading into the law of language which, in fact, is not there.

"This matter is particularly important in instances like the present where an applicant is seeking a certificate covering all commodities or general cargo. Obviously no carrier actually transports all commodities, and therefore the bona fides of an applicant's operations depend on the representative character of the transportation performed. It may well be that the carrier holds itself out to, and actually does, transport all traffic offered to it from and to all points covered by its application but that the great bulk of such transportation is exempt from regulation. It seems clear that if we shut our eyes to all of applicant's transportation except that which is subject to regulation, we get an incomplete and distorted picture of the nature and extent of its operations. To place limitations upon 'grandfather' rights predicated upon that view would be unjust and unreasonable, and is not contemplated by the law."

In the *Pope & Talbot Case*, 250 I. C. C. 117; *Schafer Bros Case*, 250 I. C. C. 353, and the *McLain Carolina Case*, 250 I. C. C. 327, the Commission construed and applied the "grandfather" provisions of the Act in the same broad manner. In the *Schafer Bros. Case* it very properly considered proof of operations more than three years prior to the "grandfather" date to establish "grandfather" rights of the applicant, and in the *McLain Carolina Case*, at page 332, the Commission made the following significant statement with respect to the "grandfather" provisions of the Act:

"There is no requirement under the 'grandfather' provisions of the act that an actual movement of specific commodities must be shown, or that the movement of traffic on a route between two ports must be constant. It is well known that much of the traffic transported over water routes moves spasmodically and that some business is nonrecurring in nature."

The operation of appellant with respect to contracts and particular commodities is special and spasmodic in a very high degree, a characteristic recognized by the Commission

in the *McLain* and other cases cited, but as to which it refused to give effect in the instant case.

We have already shown that under the provisions of section 302 (e) the leasing or chartering of vessels by the owner "to a person other than a carrier subject to this Act * * shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'." On and since the "grandfather" date the appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various shippers, none of whom are carriers subject to the Interstate Commerce Act. Under the provisions of section 302 (e) these transactions establish that the appellant was engaged in transportation for compensation as a contract carrier by water. But, as we have already pointed out, the Comission refused to so regard the transactions because, as it said (R. 11), there is no showing as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. No such showing was made by the appellant for the very obvious reason, first, that it is not required by the act and, second, such information is not within the reach or the knowledge of the appellant as lessor. In this view of the law the Commission followed the precedent established in its original decision in the *C. E. Harms Company Case*, 250 I. C. C. 513, which was made about eight months before the decision in the instant case.

The *Harms Case* was reopened and reconsidered by the Commission. In its decision of January 4, 1944, on reconsideration, 260 I. C. C. 171, it reversed the previous decision which had construed the applicable sections of the Act in the same manner as the Commission construed them against appellant here. The question in the *Harms Case* as to charter transactions, as here, is whether where the owner of a vessel leases or charters the vessels to a shipper, the owner must show the nature of the service ren-

dered, the commodities carried, and the ports served with such vessel by the lessee. In the instant case and in the first decision in the *Harms Case* the Commission held that the lessor must make such a showing to be entitled to a permit under the "grandfather" provision of the Act. In reversing the original decision in the *Harms Case*, 260 I. C. C. 171, 172, the Commission made the following appropriate and cogent statement of the law:

> "It is conceded that the construction placed upon Section 309 (g) by the Division is proper when applied to carriers who for themselves determine the extent of their operations and the services they will render or the 'scope thereof.' Applicant argues that the rights of a carrier under the 'grandfather' clause of the statute must be determined by what it does in bona fide operation, and that such rights are not enlarged or otherwise affected by what others, independent of the carrier, may or may not do. That construction and application of the statute assures the carriers a certificate or permit to continue its operations as maintained on the statutory date and continuously since. Applicant on January 1, 1940, and continuously since, has held itself out to hire its vessels to anyone for any use for which they were suited without limitation as to the commodities to be transported or the place or places to which they were to be moved. It claims, therefore, that the permit to which it is entitled under the so-called 'grandfather' clause of the statute would permit it to continue the carrier business in which it was engaged on and since the statutory date. It further claims that the limiting of its permit to defined territory based upon the use to which the hirer of its vessels used them on and since the statutory date restricts its business materially and prevents it from continuing the operations in which it was engaged and in which it continuously has been engaged. We conclude that the claims of applicant are well grounded. The territorial limitations imposed by the permit issued April 14, 1943, are not warranted and should be removed."

The final decision of the Commission in the *Harms Case* on reconsideration is in accordance with the letter and the spirit of the applicable statutes. The decision in the instant case is contrary to the letter and the spirit of the statute. It should be kept in mind that under section 302 (e) of the Interstate Commerce Act chartering transactions constitute, as to the vessels leased or chartered, "engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of contract carrier by water." It will thus be seen that as the appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various shippers, none of whom are carriers before, on, and continuously since the "grandfather" date, it must be held to have been engaged in bona fide operation as a contract carrier by water during the critical period and is therefore entitled to a permit from the Commission under section 309 (f) of the Interstate Commerce Act.

Among other decisions the appellees have cited the decision of this court in *Noble* v. *United States*, 319 U. S. 88, as supporting the proposition that because during the critical period the transportation services of the appellant were confined to petroleum products in bulk, it is not entitled to a permit. This contention overlooks entirely the fact that during the critical period the appellant was engaged in transportation as a contract carrier by water at least, as the term is defined in section 302 (e), by virtue of its chartering transactions. In the *Noble Case* the Commission limited the business of the motor carrier there involved to the types of shippers it had done business with on the critical date. The provisions of section 209 there interpreted are in the respects here pertinent the same as the provisions of section 309 (g). That section authorizes the Commission in granting a permit to a contract carrier to specify in the permit the business of the carrier and the scope thereof.

Noble argued that once the territory he may serve and the commodities he may haul have been determined he should be allowed to transport these commodities for anyone he chooses to serve within such territorial limits. On the critical date Noble had exclusively served food canneries or meat packing houses. The court held that to grant the rights sought by Noble would make a basic alteration in the characteristics of the enterprise of the contract carrier, and that in such circumstances the "grandfather" clause would be utilized not to preserve the position which the carrier had obtained in the nation's transportation system, but to enlarge and expand the system beyond the pattern which the carrier had acquired on the "grandfather" date. In the instant case the appellant did not seek a permit from the Commission which would make a basic or other alteration in its characteristics. On the contrary, the permit sought merely authorized the appellant to continue to perform the character of transportation transactions it and its predecessors have performed for four generations. The facts here are more analogous to the facts in the *Lee Wilson & Co. Case*, 29 M. C. C. 525, where the Commission authorized the contract carrier there involved to transport commodities generally, and overruled the contention made that the permit should be restricted to particular commodities. In the *Wilson Case* the Commission said that "The variety of commodities which applicant will be called upon to carry makes it impractical to attempt to narrow this service to a particular class or classes of commodities."

For the reasons stated it is clear that in denying the appellant a permit under the "grandfather" provisions of section 309 (f) the Commission acted arbitrarily and unreasonably and misconceived and misapplied the applicable statutes.

## II.

### Appellant is Entitled to a Permit to Establish Future Operations and to Make New Contracts Under the Provisions of Section 309 (g) of the Act.

Under the provisions of section 309 (g) a contract carrier by water is entitled to a permit if it files an appropriate application with the Commission, and if the Commission finds "that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part * * * and that such operations will be consistent with the public interest and the National Transportation Policy declared in this Act." The examiner who heard the evidence properly held that the Commission may appropriately take a broader view with respect to an application for future operation than it is permitted to take in determining the rights of a water carrier under the "grandfather" clause. He said that where, as here, the applicant is and has been engaged in business similar to that which the permit is sought, consideration may and should be given to its historical background, to the character of the service rendered with respect to both regulated and unregulated traffic, and to the territory served during whatever period information is available in connection with such matters. He concluded that with these considerations in mind, together with the financial standing of the applicant, that the Commission should find that it is fit, willing and able to perform the service proposed, and that such service will be consistent with the public interest and the National Transportation Policy. The Commission, Division 4, reversed the examiner. It held that the appellant did not, in fact, propose any new operation and had failed to show that a new operation by appellant would be consistent with the public interest or the National Transportation Policy, or that the present or future public convenience and necessity requires such operations.

While it is true in a strict sense that the appellant did not propose the establishment of a new operation and that

the application under section 309 (g) was filed out of abundance of caution and at the suggestion of one of the bureaus of the Commission, it is likewise true that the evidence before the Commission established that the appellant is fit, willing and able properly to perform the character of contract service sought by the application and that such service will be consistent with the public interest and the National Transportation Policy. While recognizing that most of the equipment of appellant was being used in the transportation of bulk petroleum products and that this is an emergency movement occasioned by the war, the Commission nevertheless allowed this temporary characteristic to control its ultimate conclusion. It failed to reach the point of giving serious consideration to the special characteristics of the appellant, of its desire to continue to make the kind of contracts in the future that it had made in the past and to perform the kind of transportation, including the chartering transactions, in the future that it had made in the past. The Commission also failed to consider relevant evidence which established the claims of the appellant in these respects.

A contract carrier by water is only required to establish that a proposed operation will be consistent with the public interest and the National Transportation Policy. In the *Scott Bros. Case*, 2 M. C. C. 155, 164, the Commission had occasion to construe and apply a similar phrase used in section 209 (b) of Part II of the Act. The Commission said, after considering the various decisions which threw light on that question:

> "It follows from this point that its true meaning is that of 'not contradictory or hostile to the public interest.' Such decisions as we have been able to find support this interpretation of the phrase."

It requires a strained and labored interpretation of the law to justify the conclusion of the Commission that the continued operation of a water carrier such as the appel-

lant, which has used the Ohio and Mississippi Rivers and their tributaries for four generations in chartering and in other transportation transactions, could or would be hostile to the public interest, or otherwise expressed, would not be consistent with the public interest and the National Transportation Policy. In numerous decisions the Commission has held that the operation of a water carrier for a long period of time establishes, without more, that its continued operation is required by the present and future public convenience and necessity. It has held that if it should decide otherwise the Commission would not be following the direction of the National Transportation Policy of the Act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense. *John L. Goss Corp.*, 250 I. C. C. 101, 103; *Choctaw Transportation Co.*, 250 I. C. C. 106, 107; *Reidville Oil & Guano Co.*, 250 I. C. C. 71, 73.

In the *John L. Goss Corp. Case*, the Commission said apropos of this question:

> "Applicant's operation as a water carrier for fifty years is evidence of the fact that continuation of the operation is required by present and future public convenience and necessity. If we were to decide otherwise, we would not be following the direction of the national transportation policy of the act to preserve a national transportation system adequate to meet the needs of the commerce of the United States and of national defense."

The appellant has the financial ability, the willingness, and the equipment to engage in transportation and chartering transactions as a water carrier. The Commission acted arbitrarily and contrary to the evidence and the law in refusing to issue a permit to the appellant. The steel barges of appellant which are being used under existing emergency conditions to transport petroleum products in bulk can be converted, with little expense and on short notice, to general cargo vessels.

In the lower court and before the Commission the point was made that no testimony of shippers or chambers of commerce was introduced to support the application of the appellant for a permit authorizing future operations. In its report the Commisison did not comment upon the absence of such testimony. Upon reflection it will be at once apparent to the court that in the nature of things it would be difficult, if not impossible, for a contract carrier, as distinguished from a common carrier, to support an application with this character of testimony. Moreover, the Commission itself has frequently commented on the lack of probative value of such testimony. For example, in the *Santa Fe Trail Stages Case*, 21 M. C. C. 725, 753-754, the Commission recited that about 50 so-called public witnesses testified in favor of the proposed operations there involved and about an equal number felt that the existing service was satisfactory and adequate. It also said that most of the witnesses who favored the extensions were actuated by a desire on general principles for more service and competitive carrier interests. It then said:

> "As was said in *San Antonio & A. P. Ry. Co. Construction*, 111 I. C. C. 483, 495, sentiment in favor of new service is to be discounted inasmuch as public sentiment almost invariably favors it even where clearly unwarranted, but nevertheless it is entitled to some weight since 'in some substantial measure it is based upon experience of benefits to be derived from competition of rival * * * systems of demonstrated strength and efficiency.' Similarly, the testimony of those opposed, who were satisfied with the existing service, must also be discounted."

While appellant does not expect this court to weigh the evidence as that is the function of the Commission, it is appropriate to point out that the absence of testimony of so-called shipper or public witnesses in this case is of no significance.

The arbitrary nature of the action of the Commission here will be illustrated by contrasting that action with

the decision of Division 4 of January 11, 1945, not yet reported, in disposing of the application of the *Newtex Steamship Corporation*, No. W-896. The applicant there sought a certificate of public convenience and necessity to operate as a water common carrier in coastwise service between New York and certain Texas gulf ports. In that case the applicant has no equipment, and is not able at the present time, to perform the service sought by the application; that applicant is willing, but neither fit nor able, to perform that service. Despite these deficiencies, Division 4 found that the future public convenience and necessity will require the operations proposed by that applicant. Because that applicant has no vessels available to perform the proposed service the Commission withheld the actual issuance of the certificate for the time being.

Despite the fact that in the instant case the appellant has the equipment and the present financial ability, willingness and fitness to engage as a contract carrier by water in transportation and chartering transactions now and in the future, the Commission denied its application. The action of the Commission in the Newtex Steamship Corporation case cannot be reconciled with its action here. While again recognizing that inconsistency on the part of the Commission is not of itself a ground for setting aside its order, this kind of inconsistency does tend to establish appellant's claims that the Commission acted arbitrarily and capriciously in the instant case.

## CONCLUSION.

It cannot be assumed that in enacting Part III of the Interstate Commerce Act Congress meant to destroy or obstruct the development of water carriers of the highly specialized type of appellant. On the contrary, the principal purpose of that act is to encourage, foster, develop and promote transportation by water in all of its forms. The decision of the Commission here assailed will defeat this purpose.

The effect of the Commission's decision, if sustained, will cause appellant irreparable injury. Without a permit to continue to handle general cargo and to engage in chartering transactions appellant will not be in position to make contracts of that character until and unless in each instance it files an appropriate application with the Commission and obtains a permit. This will involve expense and delays. Moreover, it will be difficult, if not impossible, for the appellant to function under any such procedure. In addition, unless the decision of the Commission is set aside, it will have the effect of placing in a preferred position the large common carriers by water, such as the Mississippi Valley Barge Line, the American Barge Line, the Campbell Transportation Company, and others to the detriment of river commerce and of specialized contract carriers such as the appellant. The larger carriers will be able to handle both exempt and non-exempt traffic to the extent their equipment permits, while carriers like the appellant will be restricted to the transportation of exempt traffic.

For the reasons stated it is respectfully submitted that the decision of the District Court should be reversed.

Respectfully submitted,

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March, 1945.

## APPENDIX.

### PERTINENT PROVISIONS OF INTERSTATE COMMERCE ACT.

"Sec. 302 (e). The term 'contract carrier by water' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation.

"The furnishing for compensation (under a charter, lease, or other agreement) of a vessel, to a person other than a carrier subject to this Act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water'."

"Sec. 303 (b). Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

"(d) Nothing in this part shall apply to the transportation by water of liquid cargoes in bulk in tank vessels designed for use exclusively in such service and certified under regulations approved by the Secretary of Commerce pursuant to the provisions of section 4417a of the Revised Statutes (U. S. C., 1934 edition, Supp. IV, title 46, sec. 391a).

"Sec. 309 (f). Except as otherwise provided in this section and section 311, no person shall engage in the business

of a contract carrier by water unless he or it holds an effective permit, issued by the Commission authorizing such operation: *Provided,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made, and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit is made to the Commission as provided in subsection (g) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. * * *."

"Sec. 309 (g). Application for such permit shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require. Subject to section 310, upon application the Commission shall issue such permit if it finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in this Act. The business of the carrier and the scope thereof shall be specified in such permit and there shall be attached thereto at time of issuance and from time to time thereafter such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier by water, as are necessary to carry out the requirements of this part of those lawfully established by the Commission pursuant thereto; *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his equipment, facilities, or service, within the scope of the permit, as the develop-

ment of the business and the demands of the carrier's patrons shall require."

"NATIONAL TRANSPORTATION POLICY. It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."